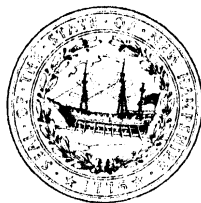


**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

MICHAEL A. DELANEY
ATTORNEY GENERAL



ORVILLE B. "BUD" FITCH II
DEPUTY ATTORNEY GENERAL

June 16, 2010

Kathleen N. Sullivan, Esquire
Wadleigh, Starr & Peters, PLLC
95 Market Street
Manchester, NH 03101

Re: Americans for Job Security and National Organization for Marriage

Dear Attorney Sullivan:

As a member of the Election Unit in the Department of Justice, I have been asked by Attorney General Michael Delaney to analyze and respond to your March 18, 2010 letter regarding Americans for Job Security (AJS) and your April 14, 2010 letter regarding the National Organization for Marriage (NOM).

You allege in your letters that both of the above named organizations are transacting business in New Hampshire without proper authorization and in violation of New Hampshire laws. You requested that this Office bring proceedings against these organizations, pursuant to RSA 293-A:15.02 (d), for transacting business in this State without a certificate of authority. Based on the evidence currently available to this Office, we conclude that AJS and NOM are not transacting business in this State; and as such, no action under RSA 293-A:15.02 will be taken against them by this Office. The evidence available to us indicates that NOM and JAS both purchased commercials that aired in this State (see discussion below). For the reasons set forth below, we conclude that such activity is insufficient to constitute "transacting business" under RSA 293-A:15.01.

Under RSA 293-A:15.01(a) "[a] foreign corporation shall not transact business" in New Hampshire "until it obtains a certificate of authority from the secretary of state." The statute contains a non-exhaustive list of activities, which do not constitute transacting business. See RSA 293-A:15.01(b)(c). Although purchasing commercials for airing in this State is not included in this list, such activity is similar in character with the activities specifically listed as not constituting transacting business, such as "selling through independent contractors." See RSA 293-A:15.01(b)(6). The statute also expressly refers to RSA 77-A:1, XII for its definition of business activity. See RSA 293-A:15.01(d).

RSA 77-A:1, XII states in pertinent part:

“Business activity” means a substantial economic presence evidenced by a purposeful direction of business toward the state examined in light of the frequency, quantity, and systematic nature of a business organization's economic contacts with the state. “Business activity” includes, but is not limited to, a group of actions performed by a business organization for the purpose of earning income or profit from such actions and includes every operation which forms a part of, or a step in, the process of earning income or profit from such group of actions. The actions ordinarily include, but are not limited to, the employment of business assets, the receipt of money, property, or other items of value and the incurring or payment of expenses. [].”

RSA 77-A:1, XII (emphasis added). Based on the evidence currently available to this Office, it cannot be said that AJS and NOM have a substantial economic presence in this State through a purposeful direction of business towards New Hampshire simply because they purchased commercials that aired in this State. Moreover, there is no evidence available that the subject commercials were aired for the purpose of earning income or profit. The recent commercial by NOM (“Lynch Lied” commercial discussed below) directs viewers to “go to Lynch.Lied.com” where they can sign up to receive a free bumper sticker and does not make a direct solicitation for money.

Furthermore, the non-profit status of both AJS and NOM supports the determination that they are not required to register with the Secretary of State under RSA 293-A:15.03. “A foreign nonprofit corporation . . . desiring to do business in this state in furtherance of . . . (its non-profit) purpose for the benefit of citizens of this state, may register as a foreign corporation by making application as provided in RSA 293-A:15.03. RSA 292:5-b (emphasis added).

NOM was formed in 2007 as a nonprofit 501(c)(4) organization with a mission to educate the general public on the importance of marriage between one man and one woman in law and society. AJS was formed in 1997 as a 501(c)(6) organization for the purpose of promoting the message that free markets and pro-paycheck public policy are fundamental to building a strong economy and creating more and better paying jobs. As non-profit organizations, AJS and NOM are allowed, but not required, under RSA 292:5-b, to register with the Secretary of State if they desire to do business in New Hampshire in furtherance of their non-profit purposes. However, without evidence that AJS and NOM are transacting business in this State, they cannot be required to register and no action under RSA 293-A:15.02 can be taken against them.

In your April 14, 2010 letter, you also asked this Office to look into whether NOM has violated New Hampshire law by funding a commercial about Governor John Lynch, which has aired in this State, without registering as a political committee. At this time, neither NOM, nor AJS, can constitutionally be required to register, and be subjected to regulation, as political committees under RSA 664:3. As a result, no action under RSA 664:21 will be taken against them at this time.

Under RSA 664:2, III, a “political committee” is “any organization of 2 or more persons to influence elections or measures [].” RSA 664:2, III. Political committees are required to register, and file a statement of purpose, with the Secretary of State. See 664:3, I. They are also subject to additional reporting requirements with regards to their contributions and expenditures. See RSA 664:6. Although it could be argued that NOM and AJS meet the definition of a “political committee” under RSA 664:2, III, they cannot be designated as political committees unless their major purpose is supporting or opposing a candidate.

The U.S. Supreme Court held in the landmark decision Buckley v. Valeo, that in order for an entity to be designated a political committee it must have “the major purpose” of supporting or opposing a candidate. See Buckley v. Valeo, 424 U.S.1, 79 (1976); see also Federal Election Comm’n v. Massachusetts Citizens for Life, Inc. (“MCFL”), 479 U.S. 238, 262 (1986) (an organization could be classified as a political committee, if its “major purpose may be regarded as campaign activity”). Registration, organizational and record keeping requirements, as applied to organizations whose major purpose is not election activity, are not narrowly tailored to meet the government’s informational interest. See Richey v. Tyson, 120 F.Supp.2d 1298, 1316 (S.D. Ala. 200) (citing MCFL).

The evidence available with regards to AJS and NOM suggests that the major purpose of these organizations is not to support or oppose candidates. As noted above, NOM is formed with the mission to educate the general public on the importance of marriage between one man and one woman in law and society. This mission is likely to be considered the major purpose of NOM. Similarly, AJS explains on its website that it believes in the message that free markets and pro-paycheck public policy are fundamental to building a strong economy and creating more and better paying jobs. The promotion of this message is likely to be considered the major purpose of AJS. Without evidence that these stated purposes are not the respective major purposes of NOM and AJS, this Office must refrain from bringing an action against these two organizations for failing to register as political committees.

Even if there was evidence that AJS and NOM had more than one major purpose, (with one of which being to support or oppose candidates) they still might not be required to register as political committees due to the chilling effect such a requirement would have on protected political speech. See North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274,

288-289 (CA.4 2008) (permitting the regulation of an organization as a political committee when the goal of influencing elections is merely one of its multiple major purposes “threatens the regulation of too much ordinary political speech to be constitutional”); see also Fed. Election Comm’n v. Wisconsin Right to Life, Inc. (WRTL), 551 U.S. 449, 457 (2007) (noting that “the First Amendment requires us to err on the side of protecting political speech”). It should be noted that at least one court has recognized that an organization “could fall within the ambit of ‘the major purpose’ test if (1) the organic documents of the organization list electoral advocacy as the organization’s major purpose or (2) if the organization spends over 50% of its money on influencing elections.” See Leake, 525 F.3d at 289. However, at this time, based on the evidence available, AJS and NOM do not fall within the ambit of the major purpose test.

You also alleged in your April 14, 2010 letter that the commercial about Governor John Lynch (hereinafter “Lynch Lied commercial”), which was recently run by NOM, constitutes implicit, and perhaps express, advocacy. The commercial contains images of Governor Lynch while using a narrator to point out alleged inconsistencies between Governor Lynch’s words and actions. The commercial concludes with the narrator stating: “Now Governor Lynch wants another term. Send him a message, go to LynchLied.com.” With regards to AJS, your March 18, 2010 letter enclosed information regarding commercials that AJS ran about now Senator Jeanne Shaheen in 2002 and 2008. These commercials claimed that the former Governor broke promises, and concluded by urging viewers to “call Jeanne Shaheen.” For the following reasons, the above-mentioned commercials by AJS and NOM do not constitute express advocacy and therefore are not political advertising as defined by New Hampshire law.

RSA 664:2, VI defines “political advertising” as “any communication . . . which expressly or implicitly advocates the success or defeat of any party, measure or person at any election.” RSA 664:2, VI (emphasis added). The U.S. District Court for the District of New Hampshire has held that RSA 664:2 is facially unconstitutional because the extent of communications covered by the word “implicitly” is unknowable, which makes the statute “impermissibly vague.” See Stenson v. McLaughlin, 2001 WL 1033614, 5, 7 (D.N.H. Aug. 24, 2001) (striking out the word “implicitly” and permanently enjoining the New Hampshire Attorney General “from enforcing RSA 664:14 and RSA 664:16 against any individual or organization engaging in political advertising that implicitly advocates the success or defeat of any party, measure or person at any election”).

RSA 664:14 regulates political advertising through identification disclosure requirements. In light of the Stenson decision, RSA 664:14 now regulates only explicit advocacy. The subject commercials do not constitute “express advocacy” because they lack words that expressly advocate the defeat of a candidate. See Buckley, 424 U.S. at 44 (the words of express advocacy are “vote for”, “elect”, “support”, “cast your ballot for Smith for Congress”, “vote against”, “defeat” and “reject”).

Kathleen N. Sullivan, Esquire
June 16, 2010
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In conclusion, based on the evidence available, neither AJS nor NOM are in violation of the laws of New Hampshire. As such, at this time there will be no action taken against these organizations by this Office. Please do not hesitate to contact me if you have questions concerning the content of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew G. Mavrogeorge", with a stylized flourish at the end.

Matthew G. Mavrogeorge
Attorney
Civil Bureau

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